



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ernie Green Industries, Inc.

File: B-222517

Date: July 10, 1986

DIGEST

1. Protest alleging that agency publicly disclosed proprietary information and conducted an auction is dismissed where protest was not filed within 10 days of the time the basis of the protest became known.
2. Protest alleging bad faith by an agency in negotiating a contract under section 8(a) of the Small Business Act is denied where protester has not presented proof that agency officials had specific and malicious intent to injure protester.

DECISION

Ernie Green Industries, Inc. (EGI) protests any award made under request for proposals (RFP) No. DAAA09-85-R-1126 and requests cancellation of that solicitation. RFP-1126 is a competitive small business set-aside and was issued by the U.S. Army Armaments, Munitions and Chemical Command (AMCCOM), Rock Island, Illinois. EGI charges that AMCCOM publicly disclosed EGI pricing information and then, in effect, conducted an auction by opening negotiations with other firms. EGI also charges that AMCCOM deliberately delayed dealing with it on a related solicitation, RFP No. DAAA09-85-R-0517, in order to make EGI noncompetitive on RFP-1126.

We dismiss as untimely EGI's protest that AMCCOM disclosed proprietary information and conducted an auction. We deny the protest on the remaining issue.

AMCCOM issued RFP-1126 on September 4, 1985, for 66,000 units of the M13 Decontaminating Apparatus. EGI responded with a proposal on November 29. On December 4, AMCCOM sent a mailgram to EGI, via the Small Business Administration (SBA), concerning this and other on-going procurements of the M13 Decontaminating Apparatus, which contained a reference to the price EGI had submitted in its proposal, and which EGI received on December 9. AMCCOM conducted negotiations under the RFP from February 5 to March 5, 1986.

EGI's first basis for its protest concerns AMCCOM's December 4 mailgram. EGI charges that this correspondence constituted public disclosure of proprietary information.

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We dismiss the protest on this issue since the matter was not timely raised. Our Bid Protest Regulations require a protest like EGI's to be filed in our Office no later than 10 days after the basis of the protest became known or should have become known. 4 C.F.R. § 21.2(a)(2) (1986). EGI received the mailgram on December 9, 1985, but EGI did not protest until April 21, 1986. Moreover, EGI's contentions appear to be without merit. The mailgram in question was directed only to the SBA and EGI. EGI has presented no evidence that anyone outside the government obtained access to the information or that competition was affected in any way. Rather, EGI merely notes that two potentially competing firms were located in the same general area as the SBA office that received the mailgram. Our Office will not sustain charges of improper price disclosure where there is no indication that competition was affected and the charges are based on conjecture and inference. Beech Aerospace Services, Inc., B-219362, Aug. 20, 1985, 85-2 C.P.D. ¶ 203; Dynal Associates, Inc., B-197348, July 14, 1980, 80-2 C.P.D. ¶ 29.

EGI's next basis for protest relates to the negotiations AMCCOM conducted under RFP-1126. EGI maintains that such negotiations, coupled with the alleged disclosure discussed above, constituted an improper auction.

We again conclude that EGI's protest is untimely. By letter dated February 5, 1986, AMCCOM advised EGI that it would be conducting negotiations concerning RFP-1126. Since EGI did not raise the issue of an auction until April 1986, its protest on this matter does not comply with our regulations' 10-day timeframe. In any case, even if we considered this issue on its merits, EGI would be unsuccessful. As stated above, there is no evidence of public disclosure of pricing data; EGI's charge that AMCCOM conducted an auction presumes such disclosure.

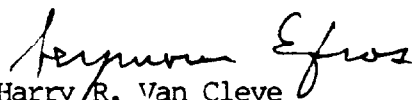
EGI's final basis for protest concerns RFP-0517, issued by AMCCOM on July 16, 1985, to the SBA for award to EGI under the authority of section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1982). The product involved in RFP-0517 is the same one solicited under RFP-1126. EGI charges that AMCCOM intentionally delayed the award under that solicitation to preclude EGI from improving its competitive position with respect to RFP-1126; EGI contends that if the contract under RFP-0517 had been timely negotiated and awarded, EGI, as an existing producer at that point, could have submitted a lower offer on RFP-1126.

A contracting officer is given broad discretion to let contracts under section 8(a) of the Small Business Act upon such terms and conditions as may be agreed upon by the procuring agency and the SBA. Accordingly, our review of actions under the 8(a) program generally is limited to determining whether regulations have been followed and whether there has been fraud or bad faith on the part of government officials. Forway Industries, B-217046, Nov. 26, 1984, 84-2 C.P.D. ¶ 573. To show that the contracting officer or SBA officials acted in bad faith, the protester has the heavy burden to present irrefutable proof that these officials had a specific and malicious intent to injure the protester. Prospect Associates, Ltd., B-218602, June 17, 1985, 85-1 C.P.D. ¶ 693.

EGI's charge of bad faith centers on the determination by AMCCOM's contracting officer as to the fair market price for the solicited items. On August 26, EGI offered to supply 20,000 units at a price of \$435.02 each. By letter dated October 16, AMCCOM advised EGI that the fair market price for the items would be no more than \$182.25. Subsequently, at EGI's request, AMCCOM agreed to increase the quantity from 20,000 to 40,000 units, and EGI then lowered its price to \$219.00 per unit. AMCCOM later decreased its estimate of the fair market price even further, after receiving offers under RFP-1126. Since EGI's final price reduction, AMCCOM has declined to award the 8(a) contract, citing EGI's high price as the primary impediment.

We deny EGI's protest on this issue. The procurement regulations generally preclude a section 8(a) award at more than the fair market price, to be determined through a price or cost analysis and by considering factors like commercial prices for similar products and in-house cost estimates. Federal Acquisition Regulation, 48 C.F.R. § 19.806 (1984). In reaching a decision concerning the fair market price for purposes of award under RFP-0517, the AMCCOM contracting officer considered offers under yet another competitive small business set-aside for the M13 Decontaminating Apparatus (RFP No. DAAA09-85-R-0576) as well as EGI's own offer on RFP-1126, which was considerably less than its offer under the 8(a) procurement. We see nothing wrong with that approach or analysis, and we therefore cannot conclude that EGI's allegations concerning AMCCOM's negotiations under RFP-0517 constitute irrefutable evidence of intent to injure the firm.

The protest is dismissed in part and denied in part.

for 
Harry R. Van Cleve
General Counsel